

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

KEN SLATER,)	
)	PCHB NO. 92-75
Appellant,)	
)	
v.)	FINAL FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
OLYMPIA AIR POLLUTION)	AND ORDER
CONTROL AUTHORITY,)	
)	
Respondent.)	

This matter came on for hearing before the Pollution Control Hearings Board on Monday, October 5, 1992, in the Board's offices in Lacey, Washington. In attendance were Board members Annette McGee, and Robert Jensen with John H. Buckwalter, Administrative Appeals Judge, presiding.

At issue was the imposition of a civil penalty on the Appellant (Slater) by the Respondent Olympia Air Pollution Control Authority (OAPCA) for alleged violations of OAPCA Regulation 1.

Appearances were:

Ken Slater, pro se, for Appellant.

Fred Gentry, Attorney, for Respondent.

Proceedings were taped and were also recorded by Randi R. Hamilton, Certified Court Reporter, of Gene Barker and Associates, Inc., of Olympia, Washington. Witnesses were sworn and testified, exhibits were admitted and examined, and arguments of the parties were heard and considered. From these, the Board makes these

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(1)

1 FINDINGS OF FACT

2 I

3 Slater has been in the business of building renovation for over
4 thirty years and is the owner of two corporations, the House Doctor
5 and the Roof Doctor. Walt Simpson is and has been the manager of The
6 House Doctor during the time period involved in this matter.

7 II

8 Slater is the owner of a residence located at 3503 Stoll Road SE,
9 Olympia WA. During the renovation of the residence by Slater's House
10 Doctor business, materials including portions of siding were removed
11 and were accumulated on the property.

12 III

13 On January 30, 1992, acting on a complaint from a Slater
14 neighbor, Greg O'Connor, an OAPCA employee, went to the Stoll Road
15 property and found considerable debris including siding scattered over
16 it. He observed a posted building permit which identified Slater as
17 the owner. O'Connor, based on his experience, recognized that the
18 siding debris contained asbestos and notified Slater that he was in
19 violation of OAPCA Regulation 1.

20 IV

21 Slater testified that, within a few days after January 30, he
22 notified his manager, Simpson, of the violations and instructed him to
23 take immediate action to remedy the problems. However, Simpson
24

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1 testified that he was not notified of the violations until February
2 27, 1992, and that it was only after that date that he initiated
3 corrective action.

4 V

5 Regardless of whether Slater or Simpson is correct about when
6 Simpson learned of the violations, it is apparent that Simpson
7 initiated no corrective action until after February 27, a month after
8 the violations were discovered and reported to Slater.

9 VI

10 After February 27, Simpson contacted OAPCA for information or
11 instructions on to how to correct the deficiencies. He was given
12 information on what had to be done, but not the names of contractors
13 licensed to perform the cleanup. After several weeks of contacting
14 various contractors, Simpson arranged with a licensed contractor,
15 Tachon, to remove the four to five pounds of material for \$3800. It
16 was approximately six weeks more before Tachon started the cleanup.
17 During this time, Simpson remained in contact with O'Connor regarding
18 the problems and obstacles he was encountering.

19 VII

20 On April 1, 1992, the OAPCA Control Officer, Chuck Peace, issued
21 three Notices of Civil Penalty Assessment to Slater for the alleged
22 violations of OAPCA Regulation 1: the first for \$50 alleging
23 violation of Sections 14.05 and 14.07 for "Failure to file a Notice of
24

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(3)

1 Intent to remove asbestos and allowing the removal or asbestos
2 material"; the second for \$1,000 alleging violation of Section 14.09
3 for "Allowing the breaking up of asbestos material. Did not follow
4 proper removal methods"; the third for \$3,000 alleging violation of
5 Section 14.11 for "Failure to follow proper handling and disposal of
6 asbestos materials".

7 VIII

8 In determining the amounts cited above, Peace followed the OAPCA
9 guidelines for assessment of civil penalties for asbestos violations.
10 The guidelines for asbestos violations give the the following ranges:

11 1st violation \$50 - \$500

12 2nd violation....\$1,000 - \$2,000

13 3rd violation....\$3,000 - \$5,000

14 Although all three violations were discovered at the same time and
15 arose from the same incident, Peace treated them as a \$50 first
16 violation followed by a \$1,000 second violation and a \$3,000 third
17 violation of OAPCA Regulation I rather than a \$50 first time penalty
18 for each of the three violations.

19 IX

20 On April 16, 1992, O'Connor visited the site again and found that
21 debris was still present. He sent a piece of the debris to a
22 certified laboratory which confirmed that it contained asbestos. On
23 April 30, 1992, he visited the site again and took pictures of debris
24

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(4)

1 which was still present.

2 X

3 On April 30, 1992, Slater filed a timely appeal for review with
4 this Board. Any Conclusion of Law deemed to be a Finding of Fact is
5 hereby adopted as such. From these Findings of Fact the Board makes
6 these

7 CONCLUSIONS OF LAW

8 I

9 This Board has jurisdiction over the parties and the subject
10 matter of this action. RCW's 43.21B.110 and 43.21B.310. Because this
11 is an appeal of a civil penalty, Respondent OAPCA has the burden of
12 proof. WAC 371-08-183.

13 II

14 Slater does not contest that the alleged violations took place.
15 He does claim that the OAPCA actions should be vacated because
16 O'Connor, the OAPCA Control Authority, had no right to enter Slater's
17 property. That right is given by RCW 70.94.200:

18 *"For the purpose of investigating conditions*
19 *specific to the control, recovery or release of air*
20 *contaminants into the atmosphere, a control officer ...*
shall have the power to enter at reasonable times upon any
private or public property..."

21 We conclude that O'Connor had the right of entry into Slater's
22 property, that the violations did occur, and that the imposition of a
23 penalty or penalties by OAPCA was justified.
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III

Slater claims that the total fine of \$4,500 should be vacated or mitigated because he had no knowledge that the discarded siding contained asbestos, that there was no intent to commit the violations, and that the total assessment is too high for three different violations cited for the same incident.

IV

Even if the Board accepted Slater's claim of lack of knowledge in spite of his thirty years plus experience with building materials, lack of knowledge or intent is not a defense for violations committed under the Clean Air Act (RCW 70.94.040). We held in Pearson Construction v. PSAPCA, PCHB No. 88-186 (1989) that:

"The Washington Clean Air Act is a strict liability statute. Acts violating its implementing regulations are not excused on the basis of intent".

Accordingly, we conclude that Slater's alleged lack of knowledge or intent is not reason for vacation or mitigation of the penalties imposed.

V

Slater contends that the asbestos in the siding was "low grade" and not potentially harmful to health. However, he produced no evidence to support his opinion, and we conclude that the potential harm to the public from the asbestos does not warrant vacation or mitigation.

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VI

Slater claims that the length of time for cleanup, from January 30 to or beyond the 30th of April was due to difficulty in finding a contractor, the length of time before the contractor started cleanup, and the failure on the part of the contractor to perform the job adequately and completely.

In Pearson supra we further held that "...the duty to comply cannot be delegated away by contract", and we conclude that the length of the time for the contractor's cleanup is not reason for mitigation of the penalties.

(Without considering this as being dispositive, we note also that the difference in Slater's and Simpson's testimony as to when Simpson was notified of the violations raises a question of credibility when determining Slater's rapidity of response.)

VII

Slater contends that the penalties imposed for the three violations should be based on the first time offense range for each of the three (which would result in a total maximum fine of \$1500) rather than the first, second, and third offense criteria used by OAPCA in reaching its \$4,500 total.

There is some ambiguity in the language of the OAPCA guidelines as to how fines are to be applied for multiple violations. The guidelines state that "It is the Policy of (OAPCA) to assess higher

1 civil penalties for repeat offenses" (emphasis added) implying that
2 the higher ranges are applied to the same offense if repeated in
3 separate incidents. However, the guidelines also state that they are
4 "not intended to define absolute limits to the civil penalties
5 assessed...Each case must be evaluated individually".

6 VIII

7 Mr. Peace testified that he assigns the higher range values for
8 different violations rising out of the same asbestos incident because
9 of the potential for harm to the public from the asbestos. We will
10 not alter the descisions of an agency unless we find good cause. In
11 this matter we consider three factors: the potential harm to the
12 public, the strict requirements for disposal of asbestos materials
13 which Slater should have known because of his experience of over
14 thirty years with building materials, and the length of time between
15 notification of the violations to Slater and the accomplishment of
16 cleanup. We conclude that that there is no good cause for mitigation
17 of the penalties.

18 IX

19 Any Finding of Fact deemed to be a Conclusion of Law is hereby
20 adopted as such. From the Conclusions of Law, the Board enter this
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ORDER

THAT the total civil assessment by OAPCA of \$4,500 is AFFIRMED, but that \$1,500 of the fine shall be due and payable to OAPCA upon issuance of this order and that the remaining \$3,000 shall be SUSPENDED on the condition that Appellant Slater shall have no further asbestos violations of OAPCA Regulation 1 for two years following issuance of this Order.

DONE this 27th day of October, 1992.

POLLUTION CONTROL HEARINGS BOARD


ANNETTE S. MCGEE, Member


ROBERT V. JENSEN, Member


JOHN H. BUCKWALTER
Administrative Appeals judge

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